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COURT OF CRIMINAL APPEALS
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FILED
COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

DANNA PRESLEY CYR,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

On the State of Texas's appeal

from Cause No. 11-19-00041-CR
in the Eleventh Court of Appeals at Eastland

as appealed from Cause No. 18-4835
in the 106th Judicial District Court of
Gaines County, Texas

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF THE
COURT OF CRIMINAL APPEALS:

NOW COMES Appellant, Danna Presley Cyr ("Ms. Cyr"), and files this Motion for Rehearing in accordance with Texas Rule of Appellate Procedure 79.

Introduction

A Gaines County jury convicted Ms. Cyr of injury to a child, four-month-old J.D., by omission. It is undisputed that Ms. Cyr's husband caused serious, life-threatening injuries to J.D. by shaking her violently or by striking her head or causing her head to strike or impact against a hard surface. Ms. Cyr's culpability arose, according to the State, from her failure to prevent Mr. Cyr's violent attack or from her failure to seek immediate medical care. Ms. Cyr premised her defense entirely on concurrent causation. In other words, even if Ms. Cyr performed preventative acts, such as removing the child from the house, calling the police, placing herself between the child and Mr. Cyr, or seeking immediate medical attention, it would have made little difference in the outcome because Mr. Cyr had already inflicted serious and irreparable injuries.

The question on appeal was whether there was some evidence upon which a rational jury could determine whether Ms. Cyr's omissions were clearly insufficient to cause serious bodily injury to J.D. The Eastland Court of Appeals held that there was. As a result, the court held that the

trial court committed reversible error in not submitting an instruction on concurrent causation.

The State Prosecuting Attorney petitioned this Court for discretionary review. In essence, the State argued that concurrent causation does not apply, as a matter of law, in omission cases because the defendant is rendered criminally responsible for the actions of the other actor.[1] This Court granted review.

This Court, with five judges in a majority opinion and joined by Judge Keel, concurring, reversed the court of appeals. Three judges dissented. Both the majority and the dissent rejected the State's categorical approach.[2] Essentially, the majority held that the evidence raised an alternative cause; not a concurrent cause.[3] Judge Yeary, dissenting, disagreed: "Here, Appellant is plainly invoking not an alternative cause, but 'another cause'—a cause in *addition* to her own conduct—and one that she claims, with justification, operated

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1 State's Petition for Discretionary Review, at 4.

2 Opinion, at 20; Dissenting Opinion, at 5-9 (Yeary, J., dissenting).

3 Opinion, at 8 ("Because Appellant points to no evidence relevant to a concurrent-causation instruction and instead argues alternative cause, we reverse the judgment of the court of appeals and affirm the judgment of the lower court.").

'concurrently' with her omission to cause the child's initial injury as alleged in the indictment."[4]

Because Judge Yeary is correct, Ms. Cyr respectfully requests that the Court reconsider its opinion and holding.

Issue on Rehearing

Issue No. 1: Because there was some evidence in the record that would allow a jury rationally to conclude that Ms. Cyr's conduct was clearly insufficient to cause serious brain trauma, the majority of this Court should reconsider its holding that Ms. Cyr was not entitled to a charge on concurrent causation?

Discussion

This Court compared the situation in this case to that in *Barnette v. State*[5] to support its holding that Ms. Cyr only described an alternative cause rather than a concurrent cause.[6] In *Barnettte*, the defendant was charged with murder of a child and reckless or negligent injury to a child.[7] The State's theory of the case was that the defendant had placed

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4 Dissenting Opinion, at 10 (emphasis in original).

5 709 S.W.2d 650 (Tex. Crim. App. 1986).

6 Opinion at 13-16.

7 709 S.W.2d at 650.

the child in scalding hot water or that she had left him unattended in a tub with lukewarm water and that the child had turned on the hot water.[8] The defense argued that the child turned on the hot water, which it characterized as a concurrent cause.[9] With respect to murder, this Court explained that the defendant was not entitled to a concurrent causation charge because the child's act in turning on the hot water was an alternative cause, not an concurrent cause.[10] In other words, whether the child turned on the hot water is a different explanation for what caused the child's death from the cause—placing the child in scalding hot water—that the State advanced. And because it merely negated an element of the State's case, it was not "defensive" and did not require a separate charge.[11] With respect to reckless or negligent conduct in leaving the child unattended and, thus, permitting the child to turn on the hot water, the Court held that the requested concurrent causation

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8 *Id.*

9 *Id.*

10 *Id.* at 651.

11 *Id.* at 652 ("'Alternative cause,' however, is not such a defense. It is simply a different version of the facts, one which negates at least one element of the State's case.").

instruction was as consistent with guilt under the State's theory of the case as it was with the defense.[12] Thus, no charge was warranted.

Building upon the reasoning in *Barnette*, the Court held that Ms. Cyr's defense was entirely premised on foreseeability and, thus, merely negated the essential element of awareness required to establish recklessness.[13] The Court relied heavily on the holding in *Williams v. State* [14] to demonstrate that recklessness requires a high degree of foreseeability and risk to trigger criminal responsibility.[15] As a result, according to this line of reasoning, Ms. Cyr had ample opportunity to convince the jury that she lacked culpability because she could not have foreseen the risk that Mr. Cyr would cause the injuries.

Judge Yeary strongly disagreed with the Court's approach, arguing that it misdirected the inquiry away from the only question relevant in this case—whether Ms. Cyr's omissions were clearly insufficient to have

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12 *Id*. at 651 ("It was certainly not error for the trial court to refuse to instruct the jury to find appellant not guilty if they found to be true facts that would prove her guilty of injury to a child.").

13 Opinion at 16-19 ("Appellant's awareness of the ongoing abuse was provided for in the nature of the offense and is unrelated to causality insofar as it merely contests mental culpability.").

14 235 S.W.3d 742 (Tex. Crim. App. 2007).

15 Opinion at 17-19.

caused J.D.'s injuries.[16] Because Mr. Cyr's initial actions in causing J.D.'s injuries plainly were another cause in addition to Ms. Cyr's omissions in failing to protect the child and failing to seek immediate medical assistance, rather than an alternative explanation for how the child was injured, Judge Yeary rightly concluded that this case involves concurrent causation under § 6.04 of the Texas Penal Code. Based on the facts and circumstances in this case, the jury could have rationally concluded that Ms. Cyr's omissions were clearly insufficient to cause the injuries.[17]

The sufficiency of an act or omission to cause a result under the last clause of § 6.04 of the Texas Penal Code is not a mutually exclusive inquiry to whether a defendant is aware of a substantial and unjustifiable risk sufficient to establish criminal recklessness. Rather, a rational jury could conclude that there is sufficient evidence to establish

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[16] Dissenting Opinion, at 10-12 ("The question therefore plainly devolves into one of whether that concurrent cause was 'clearly sufficient' to cause the injury while her omission was 'clearly insufficient.'").

[17] *Id*. at 11 ("Failing to protect the child cannot cause an injury that no other causal agent ever inflicts. The jury could have rationally concluded that her omission was 'clearly insufficient,' by itself, to cause the injury."); *id*. at 13 (agreeing with the lower court's holding that because the medical testimony demonstrated that it was only "possible" that earlier medical intervention could have mitigated the child's injuries, "a rational jury might still have found that [Ms. Cyr's] failure to seek medical attention was 'clearly insufficient' to cause the greater incremental injury, while her husband's conduct was 'clearly sufficient.").

criminal culpability and, at the same time, find that a defendant's conduct is clearly insufficient to cause a result. This is such a case.

This Court noted: "Factually, the harm to J.D. would not have occurred, if, instead of asking that Justin 'stop hurting the baby,' Appellant had removed the children from Justin's presence, alerted law enforcement, or otherwise taken action to prevent harm to J.D. 'But for' Appellant's failure to act on her duty to protect her child, J.D. would not have suffered such horrific abuse."[18] The jury, however, could have rationally concluded from all of the evidence[19] that Ms. Cyr became sufficiently aware of the danger Mr. Cyr posed to J.D. on the night he severely injured her, rather than at an earlier time, thus triggering her duty to act by protecting the child and seeking medical intervention. But the jury could have found that any actions on Mr. Cyr's part, such as

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[18] Opinion, at 16.

[19] This would include all of the facts and circumstances that the Court characterized as an avalanche of evidence of "Justin's ongoing abuse of J.D. when he was present in the home." Opinion, at 18-19 & n.8. The jury perhaps could have concluded, rationally, that Ms. Cyr's awareness of Mr. Cyr's violent propensities arose at an earlier time, based on what the older children saw, the open floor-plan, and the presence of old injuries, but it need not have done so. A defendant is entitled to a defensive instruction even if the evidence supporting it is weak, impeached, contradicted, and lacking in credibility. *Granger v. State*, 3 S.W.3d 36 (Tex. Crim. App. 1999). Factors such as these are not relevant to entitlement to an instruction, but may find relevant to harm from its absence.

calling the police, taking the child from the house, or seeking medical care at the nearest hospital, would have done little to alleviate the injuries that Mr. Cyr inflicted. Ms. Cyr was entitled to argue this defense and to have a vehicle in the jury charge that would have allowed the jury to consider it.

WHEREFORE, PREMISES CONSIDERED, Appellant, Danna Presley Cyr, respectfully requests that this Court consider the contentions raised in this motion for rehearing; withdraw its opinion and judgment issued on December 21, 2022; affirm the holding of the court of appeals reversing the trial court's judgment and remanding for a new trial; and grant her any other relief to which she may be entitled.

Respectfully Submitted,

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/s/ Paul E. Mansur

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I certify that on January 27, 2023, I served a true and correct copy of Appellant's Motion for Rehearing on counsel for the State, at the following:

/s/ Paul E. Mansur
Paul E. Mansur

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